

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN A. GRACE,

Defendant.

No. CR-04-0026-FVS

ORDER DENYING MOTION FOR
NEW TRIAL

THIS MATTER came before the Court on Defendant's Motion for Acquittal, or in the Alternative, for New Trial, Ct. Rec. 141. The Court heard oral argument in this matter on April 8, 2005. Plaintiff is represented by Assistant United States Attorney Joseph H. Harrington. Defendant is represented by Philip E. Nino.

I. PROCEDURAL HISTORY

Count I of the Superseding Indictment charged the Defendant with distribution of 5 grams or more of a mixture or substance containing cocaine base in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Count II charged the Defendant with assault of a federal officer in violation of 18 U.S.C. § 111(a)(1) and (b). On February 10, 2005, a jury convicted the Defendant on both counts. Defendant now moves for judgment of acquittal on count II, or in the alternative, for a new trial on the basis that the Court erred in denying his motion to

1 sever and his motion to suppress his statements. In connection with
2 Defendant's motion, the Court requested briefing on the issue of
3 whether the prosecutor's misstatements regarding the burden of proof
4 on self-defense amounted to plain error.

5 **II. BACKGROUND**

6 The following summary of facts is provided for background
7 purposes only. On January 21, 2004, the Defendant agreed to meet the
8 Government's cooperating source (CS) in the Rosauers parking lot on
9 3rd Avenue in West Spokane to sell the CS some crack cocaine. The
10 CS, who had been instructed to wait at the front entrance to the
11 store, was picked up by the Defendant in a Mitsubishi Sports Utility
12 Vehicle (SUV). The SUV then parked in the Rosauers lot in an area
13 where the Drug Enforcement Administration (DEA) had set up
14 surveillance. A few minutes later, the CS exited the SUV and gave
15 surveillance officers a pre-arranged "buy complete" signal. DEA
16 Agent Michael Zidack and Task Force Officer (TFO) Rick Taylor then
17 exited their vehicle and proceeded towards the Defendant's SUV on
18 foot. Other surveillance officers entered into the parking lot by
19 car to assist with the stop of Defendant's vehicle.

20 Agent Zidack testified at trial that he was wearing marked
21 police raid gear and yelled "Stop the vehicle. Show us your hands"
22 numerous times. TR, at 262, 265. TFO Taylor testified that he too
23 was wearing police raid gear and was yelling "Police, Stop the car.
24 Stop, Police, Stop." TR, at 228-29. Although these events
25 transpired very quickly, TFO Taylor believed that at one point he
26 made eye contact with the Defendant. TR, at 230. Both officers had

1 their weapons drawn. TR, at 230, 261. The Defendant is accused of
2 accelerating his vehicle directly towards Agent Zidack in an attempt
3 to hit him. Agent Zidack shot the Defendant through the windshield
4 and then jumped out of the way of the oncoming vehicle.

5 Defendant disputed whether the "police" markings on Agent
6 Zidack's and TFO Taylor's raid gear were visible. There was evidence
7 that Agent Zidack was wearing a jacket over his marked bullet proof
8 vest and that the markings on TFO Taylor's vest were smaller and
9 therefore less visible than the markings on Agent Zidack's vest.
10 See, e.g., Government's Exhibit 12 (Photograph of Detective Rick
11 Taylor's vest depicting "Police") (size of markings); Government's
12 Exhibit 13 (Photograph of Special Agent Zidack's vest depicting
13 "Police") (size of markings); Testimony of Agent Zidack (TR, at
14 262) (jacket partially obstructed markings on vest); Testimony of Fred
15 Shuman (TR, at 448-49) (Zidack wore a hooded jacket); Testimony of Eli
16 Kington (TR, at 458-59) (both officers wearing dark clothing). The
17 Defendant also disputed whether Agent Zidack's and TFO Taylor's
18 verbal commands were audible. See, e.g., Testimony of Eli Kington
19 (TR, at 458-59); Testimony of TFO Jay McNall (TR, at 441). The
20 Government contended that the Defendant must have heard the officers'
21 commands because the window of the Defendant's car was "nearly ½ way
22 rolled down when the officers were identifying themselves and yelling
23 at him." See United States' Response. This is a slight
24 overstatement of the Government's evidence. See Government's Exhibit
25 18. In addition, there was also testimony from a defense expert that
26 the window must have been rolled up when Agent Zidack shot the

1 Defendant based on a blood spatter pattern on a specific part of the
2 window.¹

3 Upon Defendant's arrest he was transported to the Sacred Heart
4 Medical Center Emergency Room to receive medical attention.
5 Defendant asked if anyone wanted to speak to him. At approximately
6 2:00 a.m., agents and officers interviewed Defendant after advising
7 him of his *Miranda* rights. Detective Donald Giese, who was the
8 primary interrogator, stated that the Defendant had no trouble
9 understanding or responding to questions. The Defendant subsequently
10 confessed to the drug crime but made statements which supported his
11 theory of self-defense on the assault charge. In sum, the Defendant
12 told Detective Giese that he was frightened for his life because
13 individuals wearing masks and carrying guns in the parking lot were
14 trying to rob him.

15 **III. DISCUSSION**

16 On a motion for judgment of acquittal, the court reviews the
17 sufficiency of the evidence in the light most favorable to the
18 government. *United States v. Alston*, 974 F.2d 1206, 1210 (9th Cir.
19 1992). "A judgment of acquittal is improper if, viewing the evidence
20 in the light most favorable to the government, a rational trier of
21 fact could have found the defendant guilty beyond a reasonable
22 doubt." *Id.* A rational trier of fact could have found the Defendant
23 guilty of count II, assault on a federal officer. The Government
24

25 ¹ The prosecutor argued that the expert's opinion was highly
26 speculative because the expert did not perform any chemical
analysis to conclusively determine that the substance was
actually the Defendant's blood.

1 produced sufficient evidence, which if accepted by the jury, would
2 have proved each of the three required elements of the assault charge
3 and disproved one of the elements of self-defense beyond a reasonable
4 doubt.

5 A motion for a new trial, on the other hand, is governed by a
6 much broader standard. See Fed. R. Crim. P. 33; *Alston, supra*. In
7 considering a motion for a new trial, "[t]he district court need not
8 view the evidence in the light most favorable to the verdict; it may
9 weigh the evidence and in so doing evaluate for itself the
10 credibility of witnesses." *Id.* at 1211. With this standard in mind,
11 the Court will now turn to each of the bases for a new trial.

12 **A. Motion to Sever**

13 A motion for severance must be made both before trial and at the
14 close of the prosecution's case-in-chief to preserve the issue on
15 appeal. *United States v. Yarbrough*, 852 F.2d 1522, 1531 (9th Cir.
16 1988). There is a question as to whether the Defendant preserved
17 this issue because he did not raise it at the close of the
18 Government's case-in-chief nor at the close of evidence. See Ct.
19 Rec. 74 ("Defendant's Motion to Sever Counts 1 and 2, filed November
20 5, 2004, Ct. Rec. 65, is DENIED with leave to renew at the close of
21 evidence.") (emphasis added). At the close of evidence, the trial
22 court is in the best position to assess whether joinder is
23 prejudicial because the evidence is fully developed, the parties are
24 best prepared, and the witnesses' recollections are freshest. See
25 Fed. R. Crim. P. 14; *United States v. Free*, 841 F.2d 321, 324 (9th
26 Cir. 1988). The Court will proceed with the analysis on the merits

1 nonetheless.

2 "The indictment or information may charge a defendant in
3 separate counts with 2 or more offenses if the offenses
4 charged--whether felonies or misdemeanors or both--are of the same or
5 similar character, or are based on the same act or transaction, or
6 are connected with or constitute parts of a common scheme or plan."
7 Fed. R. Crim. P. 8(a). The term "transaction" is to be interpreted
8 flexibly and may comprehend a series of related occurrences. *United*
9 *States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990) (*citing United*
10 *States v. Kinslow*, 860 F.2d 963, 966 (9th Cir. 1988)). Where joined
11 offenses are neither connected nor provable by the same evidence,
12 joinder is improper. *Id.* A Defendant may also challenge an
13 otherwise proper joinder where such joinder would result in "actual
14 prejudice," or in other words, would have a substantial and injurious
15 effect or influence on the jury's verdict. *Terry*, at 277. To that
16 end, Fed. R. Crim P. 14 provides relief where "joinder is so
17 manifestly prejudicial that it outweighs the dominant concern with
18 judicial economy and compels the exercise of the court's discretion
19 to sever." *United States v. Brashier*, 548 F.2d 1315, 1323 (9th Cir.
20 1976).

21 It should be noted at the outset that the initial joinder of
22 these charges was proper under Fed. R. Crim. P. 8(a). *Compare Terry*,
23 at 274 (Holding that a drug and a felon in possession charge were
24 improperly joined because the gun which formed the basis for the
25 felon in possession charge was found thirteen days later during a
26 search of the defendant's home). Therefore, Mr. Grace was required

1 to show that joinder was improper under Rule 14 in order to prevail
2 on his motion.

3 Defendant's Rule 14 argument fails for several reasons. First,
4 the fact that the evidence of the drug deal was relevant to the
5 assault on a federal officer charge undermines the Defendant's
6 argument that severance would have cured the prejudicial effect of
7 the joinder. The Government was required to offer this evidence in
8 order to prove that the victim federal officer, Agent Zidack, was
9 engaged in his official duties. The Defendant also relied on this
10 evidence because the fact that drug dealers are fearful of being
11 robbed bolstered his theory of self-defense. In his cross-
12 examination of Detective Giese, defense counsel specifically elicited
13 such information. TR, at 416 (Q. "During the course of your career
14 have you encountered robberies or homicides that arose out of illicit
15 drug deals?" A. "Yes" Q. "How frequently?" A. "I really can't tell
16 you how frequently. I can say that it's not abnormal, it's, it
17 occurs.").

18 The Defendant also argued that the joinder of the two charges
19 prevented him from taking the stand in one charge and not the other.
20 This argument was addressed by the Fifth Circuit in *United States v.*
21 *Williamson*, 482 F.2d 508 (5th Cir. 1973). *Williamson*, similar to the
22 case at bar, involved the joinder of a drug charge with an assault on
23 a federal officer charge. The assault on a federal officer charge in
24 *Williamson* arose from the defendant attempting to flee in an
25 automobile after a drug bust and in the process striking a state
26 narcotics officer with the car and narrowly missing hitting a car

1 containing two other agents. *Id.* at 511. The defendant in
2 *Williamson* took the stand to explain that he drove away from the
3 scene because he feared he was being robbed by a band of shabbily
4 dressed hippies (who were in fact undercover officers). *Id.* at 512.
5 On cross-examination, the defendant denied any knowledge of a drug
6 transaction. *Id.* The Fifth Circuit found that the defendant was not
7 substantially prejudiced by the joinder of the two offenses and that
8 severance under Rule 14 was only required when the defendant wished
9 to testify in his own defense on only one of two joined offenses
10 which were clearly distinct in time, place, and evidence.
11 *Williamson*, at 512 (citing *Cross v. United States*, 118 F.2d 987 (D.C.
12 Cir. 1964)). Mr. Grace, like the defendant in *Williamson*, did not
13 make a convincing showing he had both important testimony to give
14 concerning one count and a strong need to refrain from testifying on
15 the other. *United States v. Armstrong*, 621 F.2d 951 (9th Cir. 1980).

16 For all the foregoing reasons, the Defendant's motion for a new
17 trial on this basis shall be denied.

18 **B. Motion to Suppress**

19 The Defendant was questioned while waiting for surgery and
20 contended that his waiver of his right to remain silent was neither
21 knowing nor voluntary as a result of his being under the influence of
22 Morphine. To be admissible a confession must be voluntary. *Lego v.*
23 *Twomey*, 404 U.S. 477, 483-85 (1972). The Government has the burden
24 of proving that a confession was voluntary by a preponderance of the
25 evidence. *Lego*, at 489; *United States v. Haswood*, 350 F.3d 1024,
26 1027 (9th Cir. 2003). A statement made under the influence of

1 alcohol or drugs can remain voluntary if the statement is "the
2 product of a rational intellect and a free will." *United States v.*
3 *Banks*, 282 F.3d 699, 706 (9th Cir. 2002) (internal quotations
4 omitted) (overruled on other grounds). On the other hand, a
5 confession is involuntary if, viewing the totality of circumstances,
6 "the government obtained the statement by physical or psychological
7 coercion or by improper inducement so that the suspect's will was
8 overborne." *United States v. Harrison*, 34 F.3d 886, 890 (9th Cir.
9 1994) (citation omitted).

10 The case of *United States v. Martin*, 781 F.2d 671 (9th Cir.
11 1986) is analogous to the matter before the court.² In *United States*
12 *v. Martin* the defendant received an injection of Demerol prior to
13 being questioned by officers. 781 F.2d at 672. The Court of Appeals
14 held that Mr. Martin's statements were voluntary because Mr. Martin
15 was awake; relatively coherent; had not received excessive quantities
16 or unusual combinations of drugs; had asked to speak to the officers;
17 and his injuries, while painful, did not make him unconscious. *Id.*
18 at 674. In order for a confession to be suppressed on the grounds
19 that it was involuntary due to effects of drugs or alcohol, the
20

21 ² The Government also relied upon *United States v. Lewis*,
22 833 F.2d 1380 (9th Cir. 1987); however, *Lewis* is factually
23 distinguishable because in that matter there was no evidence that
24 the defendant was experiencing any effects from general
25 anesthesia or other drugs that would prevent her from knowingly
26 and voluntarily waiving her right to be silent. *Lewis*, at 1388.
The reasoning of *Lewis* is also distinguishable because the
critical issue there was the trial judge's error in relying on
his personal experience in recovering from anesthesia in
determining whether the defendant's statement was voluntary. *Id.*

1 surrounding circumstances must be extreme. *Mincey v. Arizona*, 437
2 U.S. 385, 398-99 (1978) (Defendant's statement in near coma condition,
3 in great pain, including tubes in throat and nose and a catheter in
4 his bladder held involuntary.); *Townsend v. Sain*, 372 U.S. 293, 308-
5 09 (1963) (*overruled on other grounds*) (Defendant's confession was held
6 involuntary when he was unresponsive due to heroin withdrawal and was
7 injected by doctor with phenobarbital and hyoscine to ease withdrawal
8 symptoms.); *Medeiros v. Shimoda*, 889 F.2d 819 (9th Cir. 1989) (Holding
9 that "the surrounding circumstances, including Medeiros' [blood
10 alcohol level of 0.19] were insufficient to overcome his free
11 will.").

12 Detective Giese and Lieutenant William Rose testified at the
13 suppression hearing. The Court found both officers to be credible.
14 Based of their testimony, the Court determined that the Defendant was
15 alert, coherent, and provided meaningful answers to questions. It
16 further found that while it was unusual for a suspect to be
17 questioned under these circumstances, the Defendant's waiver of his
18 right to remain silent was knowing and voluntary. At trial, defense
19 counsel emphasized this point by asking Detective Giese whether the
20 Defendant had been the first one to initiate contact with law
21 enforcement. See TR, at 413. Moreover, during the pretrial phase of
22 this matter, the Defendant's argument that only his exculpatory
23 statements should be admitted worked against him. If the Court
24 accepted as voluntary the Defendant's statement that he believed he
25 was being robbed by the individuals who confronted him in the parking
26 lot, it followed that the Court would have to find all the statements

1 he made in the hospital to be voluntary since the statements were
2 made within a relatively short period of time.

3 For all the foregoing reasons, Defendant's motion for a new
4 trial based on the Court's failure to grant his motion to suppress
5 must be denied.

6 **C. Prosecutorial Misconduct**

7 During closing arguments, the prosecutor made the following
8 statements regarding the burden of proof on self-defense.

9 [T]he defendant is required to come forward with three
10 elements. And notice there, he has to come forward with all
three or meet all three of those elements.

11

12 Second, the defendant has to show that he reasonably believed
13 that use of force was necessary to defendant himself against
the immediate use of what? Unlawful force.

14

15 The defendant also has to prove if he's going to rely on a
16 self defense theory, that he used no more force than appeared
reasonably necessary in the circumstances.

17 TR, at 571-75.

18 Defense counsel did not object during these portions the
19 Government's closing argument; accordingly, the Court is constrained
20 to a plain error analysis. Fed. R. Crim. P. 52(b); *United States v.*
21 *Olano*, 507 U.S. 725, 732 (1993). The Court must first consider
22 whether there was an "error" that was "plain" and affected the
23 "substantial rights" of the Defendant. *Id.* The Court must then
24 determine whether the error "seriously affect[ed] the fairness,
25 integrity or public reputation of judicial proceedings." *Id.*; see
26 also *Johnson v. United States*, 520 U.S. 461, 467 (1997). As a

1 general rule, prosecutorial misstatements, standing alone, seldom
2 rise to the level of reversible error. *United States v. Young*, 470
3 U.S. 1 (1985). Notwithstanding, the Ninth Circuit has held that a
4 prosecutor's misstatements regarding the burden of proof on an
5 affirmative defense can amount to plain error even where the Court's
6 instructions correctly stated the law. *United States v. Segna*, 555
7 F.2d 226 (9th Cir. 1977).

8 **(1) Olano Test - Whether there was Error that was Plain and**
9 **Affected the Substantial Rights of the Defendant.**

10 It should be noted at the outset that while the Ninth Circuit
11 case of *Segna* predates the Supreme Court's decision in *Olano*, *Segna*
12 was neither explicitly nor implicitly overruled and used the same
13 rigorous standard to determine whether there was plain error. *Segna*,
14 at 231 ("[W]e will reverse under Rule 52(b) only in those very
15 exceptional circumstances where reversal is necessary in order to
16 prevent a miscarriage of justice or to preserve the integrity and
17 reputation of the judicial process."). Nevertheless, the Court will
18 proceed under *Olano*'s multi-step test, which guides the courts of
19 appeal in determining whether the fairness of the judicial
20 proceedings have been compromised.

21 In *Segna*, the defendant was charged with first degree murder and
22 the defense at issue was insanity. *Id.* at 229. The court found that
23 the defendant met his burden of production when he offered evidence
24 that he was suffering from a fixed delusionary system which made him
25 believe that he was a persecuted Indian. *Id.* The prosecutor in
26 *Segna* made the following statements in closing arguments regarding
the burden of production and the burden of proof on insanity: (1)

1 "One of those presumptions is that a person realizes the consequences
2 of his acts...this presumption continues until overcome by competent
3 evidence;" (2) "The only difference between his (Dr. Gorman's)
4 opinion and the other shrinks' opinions is that his opinion has a
5 presumption of law with it. That is, a man is presumed sane;" and
6 (3) "[U]nless you are convinced by scientific evidence the man
7 (Segna) is sick and doesn't appreciate the wrongfulness of his acts,
8 [you must return a guilty verdict.]" *Id.* at 230. The *Segna* Court
9 found that these statements improperly shifted the burden of proof
10 from the Government to the Defendant. *Id.* at 232. The Court further
11 held that "[a]lthough no objection was interposed, the argument
12 amounts to plain error and requires reversal." *Id.* at 230.

13 In the instant matter, Defendant's only burden on the issue of
14 self-defense was a burden of production. See *United States v. Guess*,
15 629 F.2d 573, 577 (9th Cir. 1980) ("The general rule is that once a
16 criminal defendant satisfies his burden of production with respect to
17 an affirmative defense, the prosecution must prove the
18 inapplicability of this defense beyond a reasonable doubt.").
19 Whether the Defendant met his burden of production was a legal issue
20 for the Court. The Court necessarily decided that the Defendant *had*
21 met his burden of production when it overruled the Government's
22 objection to the inclusion of a self-defense instruction. It was
23 therefore error for the prosecutor to argue to the jury that the
24 Defendant had not met this burden by stating that the Defendant had
25 to "come forward," "show", and/or "prove" these three elements.
26 *United States v. Freter*, 31 F.3d 783, 789 (9th Cir. 1994).

1 The extent of the error does not stop there because the
2 prosecutor's misstatements touched on more than the burden of
3 production. In making its determination that the remarks crossed the
4 line into the burden of proof, the Court is mindful of the fact that
5 the jury likely did not appreciate, nor should it have been expected
6 to appreciate, the difference between the burden of production and
7 the burden of proof. The Government argues that "[t]he Court merely
8 noted that evidence of self-defense had been offered, but did not
9 instruct the jury about any standard of proof attendant with such
10 evidence." See United States' Response, at 5. In so stating, the
11 Government seems to presume that it was proper for the prosecutor to
12 highlight the Defendant's failure to meet the burden of production in
13 an effort to disprove one of the elements of self-defense. This is a
14 dangerous position because it illustrates exactly the issue that the
15 Court raised, that is, whether the jury could have been left with the
16 misunderstanding that the Defendant could not prevail on self-defense
17 if he did not offer sufficient evidence on one of the elements--as
18 opposed to asking the correct question--whether the Government
19 disproved the applicability of the defense beyond a reasonable doubt.

20 The Government attempts to distinguish the reasoning of *Segna* by
21 arguing that Mr. Grace did not rely on "substantial evidence"
22 supporting self-defense. See United States' Response, at 8. The
23 Court disagrees. Defendant had more than sufficient evidence to
24 support his theory of self-defense. Where there are close factual
25 issues which leave room for a "reasonable inference inconsistent with
26 guilt," the Court should scrutinize the error with "particular care."

1 *United States v. Grunberger*, 431 F.2d 1062, 1067 (2nd Cir. 1970);
2 *Segna, supra*.

3 In this matter, Agent Zidack, the victim federal officer,
4 testified that the jacket he was wearing that night partially
5 obstructed the "police" lettering on his bulletproof vest. TR, at
6 262. Zidack further testified that he could not recall verbatim
7 either his or TFO Taylor's verbal commands. TR, at 277, 280.
8 Although this theory was not highlighted by the defense during its
9 closing argument to the jury, Zidack also admitted on cross-
10 examination that he could have jumped out of the way of Defendant's
11 vehicle. TR, at 283-85.

12 The Defendant elicited further evidence supporting his theory
13 from TFO Jay McNall and the citizen witnesses. TFO McNall testified
14 that he could not discern exactly what TFO Taylor and Agent Zidack
15 were yelling because he was in his vehicle with the windows rolled up
16 as he approached the scene. TR, at 441. Fred Shuman, a citizen
17 witness, testified that he observed Agent Zidack wearing a green
18 hooded jacket and that he did not recall if either TFO Taylor or
19 Agent Zidack had any visible markings on their clothing. TR, at 448-
20 49. Eli Kington, a second citizen witness, testified that he heard
21 the two individuals in front of the Defendant's car yelling "freeze,"
22 but did not recall anything more specific about the verbal commands.
23 TR, at 458-60. Mr. Kington also testified that the two individuals
24 he observed in front of the Defendant's vehicle (Taylor and Zidack)
25 were wearing dark clothing. Id.

26 Based on the foregoing, the Court concludes that the

1 prosecutors' misstatements amounted to error that was plain and
2 affected the substantial rights of the Defendant. Once the Defendant
3 came forward with sufficient evidence to support his affirmative
4 defense, the burden shifted to the Government to prove the
5 inapplicability of the defense and no presumption was available to
6 aid the Government in meeting its burden of proof. See *Guess*, 629 at
7 577; *Segna*, 555 F.2d at 231. AUSA Harrington's remarks, which
8 informed the jury that the Defendant had to come forward, show,
9 and/or prove the elements of self-defense, shifted the burden proof
10 from the Government to the Defendant and deprived the Defendant of
11 the benefits of the reasonable doubt standard. *Segna*, at 230. The
12 error was plain because it was clear and obvious. See *Government of*
13 *Virgin Islands v. Smith*, 949 F.2d 677, 686 (3rd Cir. 1991) (The
14 possibility that the jury will misallocate the burden of proof on
15 self-defense is readily apparent.). The error also affected the
16 substantial rights of the Defendant, specifically, his right to have
17 the Government prove each element of the case against him beyond a
18 reasonable doubt. *Segna*, at 230; see also *United States v. Roberts*,
19 119 F.3d 1006, 1015-16 (1st Cir. 1997) (The prosecutor may not imply
20 that the defendant has a burden of proving his innocence.); *Smith*,
21 949 F.2d at 682 (Diminishing the prosecution's burden of proving
22 every element of the crime violates the defendant's right to due
23 process.). Furthermore, because the Defendant presented credible
24 evidence to support his theory of self-defense, the Court finds that
25 the error likely affected the outcome of the proceedings. *Olano*, at
26 733 (An error which "affects substantial rights" in most cases means

1 that the error was "prejudicial," although the terms are not
2 synonymous.).

3
4 **(2) Olano Test - Whether the Error Seriously Affected the
Fairness of the Judicial Proceedings.**

5 Having determined that the prosecutor's statements amounted to
6 error which interfered with a substantial right, the Court turns to
7 the question of whether that error seriously affected the fairness,
8 integrity, or public reputation of the judicial proceedings. There
9 are several factors which convince the Court that the first trial on
10 the assault charge was fundamentally fair.

11 As discussed *supra*, the prosecutor's misstatements were error.
12 Nevertheless, the remarks made by AUSA Harrington are sufficiently
13 distinguishable from the statements made by the prosecutor in *Segna*.
14 In *Segna*, the prosecutor explicitly stated that the presumption of
15 sanity continued to exist, no such explicit statement was made here.
16 555 F.2d at 230. The prosecutor in *Segna* also told the jury that the
17 opinion of Government expert had "'a presumption of law with it'
18 while the other experts did not." *Id.* at 231. This statement is
19 akin to vouching which the Ninth Circuit has held to be plain error
20 outside this context. *See, e.g., United States v. Kerr*, 981 F.2d
21 1050, 1054 (9th Cir. 1992). Moreover, while the Court recognizes
22 that a jury is prone to place "great confidence" in the statements of
23 the prosecutor, *United States v. Carter*, 236 F.3d 777, 789 (6th Cir.
24 2001), a jury is also presumed to have followed the Court's
25 instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). The
26 error here was limited to the rebuttal argument and the Court

1 properly instructed the jury that the burden is always on the
2 Government. Finally, although the Defendant had a viable theory of
3 self-defense, the issue was not as close as the insanity issue in
4 *Segna*.

5 The Court is mindful that the Government's burden of proving the
6 Defendant's guilt beyond a reasonable doubt is a fundamental
7 principal of our criminal justice system. While the Ninth Circuit
8 has recognized that misstatements regarding the burden of proof on an
9 affirmative defense can amount to plain error, the Court is not
10 convinced that the threshold was met in this case. See *United States*
11 *v. Rodriguez-Preciado*, 399 F.3d 1118 (9th Cir. 2005) (A prosecutor's
12 comments regarding the Defendant's failure to testify did not amount
13 to plain error.); *Girtman v. Lockhart*, 942 F.2d 468 (8th Cir.
14 1991) (Defense counsel's failure to object to prosecutor's statement
15 that the defense had to prove self-defense did not amount to
16 ineffective assistance of counsel.); *United States v. Yancy*, 688 F.2d
17 70 (8th Cir. 1982) (The court's jury instructions can correct a
18 prosecutor's misstatement of law.); *Donnelly v. DeChristoforo*, 416
19 U.S. 637 (1974) (Prosecutor's remarks did not prejudice a specific
20 right, such as the right against self-incrimination.).

21 Accordingly, the Court concludes that the prosecutor's error did
22 not seriously affect the fairness of the proceedings. The Court does
23 not make such a decision lightly, and in so doing, has considered
24 both the prejudice to the defendant and whether or not the prejudice
25 was cured by the trial judge. *United States v. Potter*, 616 F.2d 384,
26 391-92 (9th Cir.1979). For all the foregoing reasons,

IT IS HEREBY ORDERED:

1. Defendant's Motion for Judgment of Acquittal (**Ct. Rec. 141-1**) is **DENIED**.

2. Defendant's Motion for a New Trial on the basis that the Court erred in denying his Motion to Sever (**Ct. Rec. 141-2**) is **DENIED**.

3. Defendant's Motion for a New Trial on the basis that the Court erred in denying his Motion to Suppress (**Ct. Rec. 141-3**) is **DENIED**.

4. The Motion for a New Trial on count II on the basis that the Prosecutor's Misstatements amounted to Plain Error is **DENIED**.

5. The sentencing date of June 17, 2005 is **CONFIRMED**.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

DATED this 5th day of May, 2005.

s/ Fred Van Sickle
Fred Van Sickle
Chief United States District Judge